

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Disqualification and
Revocation of the License to Provide
Child Care of Susan Orth

**FINDINGS OF FACT, CONCLUSIONS,
AND RECOMMENDATION**

This matter came before Administrative Law Judge (ALJ) Kathleen D. Sheehy for hearing on September 19, 2008, at the Washington County Government Center, 14949 62nd Street North, P.O. Box 6, Stillwater, MN 55082. The OAH record closed on October 3, 2008, upon receipt of post-hearing memoranda from the parties.

Richard A. Bowen, Attorney at Law, 767 University Avenue West, St. Paul, MN 55104, appeared for Susan Orth (Licensee).

James Zuleger, Assistant County Attorney, Washington County Government Center, 14949 62nd Street North, P.O. Box 6, Stillwater, MN 55082-0006, appeared for Washington County Human Services (the County) and the Minnesota Department of Human Services (Department).

STATEMENT OF ISSUES

1. Should Susan Orth's disqualification from providing child care be set aside?
2. Should the Department revoke the child care license on the basis of the disqualification?

The Administrative Law Judge concludes that the disqualification should not be set aside and that the child care license should be revoked.

Based on the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Susan Orth became a licensed child care provider in or about 1998 when she was employed at a daycare/preschool. She obtained the license as a credential for her employment.¹ During all time periods relevant to this proceeding, Orth was employed outside her home as a day care worker for other

¹ Testimony of Susan Orth.

licensed entities. From 1998 to approximately 2007, Orth was employed by Rainbow Kids Klub (RKK), a before and after school child care program facilitated by the South Washington School District. Orth worked at the RKK program located in the Valley Crossing Community School in Woodbury, Minnesota.

2. Orth and others also provided some child care at her home for Orth's three grandsons, who are now 13, 11, and 8 years of age, from the time of their birth through the present. When they were younger, Orth's daughter generally would drop off the boys at Orth's home in the mornings, where Orth, her husband, or another caregiver would watch them until Orth returned from work. When the children became old enough, they enrolled in the RKK at Royal Oaks Elementary for child care before and after school. Orth, her husband, or another caregiver would watch them on school release days or other times when RKK was closed.²

3. Orth's daughter applied for financial assistance and received a reduced rate for her children to attend the RKK program at Royal Oaks Elementary.³

4. Between 2003 and 2006, Orth's daughter also applied for and received child care assistance from Washington County. She identified Susan Orth as the licensed provider who cared for the children. Susan Orth completed and signed child care assistance forms indicating that each of the children was being cared for in her home during this timeframe.⁴ In 2003, she indicated that all of the children were at her home up to 11 hours per day for six days per week; in other years the forms indicate that the two older boys would be cared for at her home part-time after school and on release days, but the youngest was cared for full-time in her home.⁵ Orth certified that the information provided on these forms was true and accurate, and she signed acknowledgments agreeing to maintain daily attendance records for all children receiving assistance and agreeing to notify the County immediately of any changes to the information provided on the child care assistance forms.⁶

5. Between 2003 and 2006, Orth worked at RKK 32 hours per week on a split shift from 6:15 to 9:15 a.m. and from 3:30 to 6:00 p.m. during the school year. She worked from 6:15 a.m. to 12:30 p.m. during the summers.⁷

6. Between 2003 and 2006, the two older boys received after-school and summer day care at the RKK program. Orth nonetheless filed claims for

² Test. of S. Orth.

³ Ex. E.

⁴ Exs. G-N.

⁵ Exs. G and H (2003); Exs. I-N (2004-2006).

⁶ Exs. H-N.

⁷ *Id.*

reimbursement with Washington County indicating they were cared for in her home after school and during the summers. Orth also filed claims for providing care to the youngest child after he began attending RKK during the 2005-2006 school year. This child continued in the program during the summer of 2006.

7. Washington County paid Orth directly a total of approximately \$54,000 in day care assistance between 2003 and 2006. Orth either paid the bills for the children's care at RKK herself, or she provided funds to her daughter to pay the bills. Orth also paid other caregivers for their time watching the youngest child when Orth was at work.⁸ The extent to which Orth benefited financially from this arrangement cannot be determined on this record.

8. Orth also participated in a federally funded food program for in-home child care providers. The program reimburses providers for healthy meals served in the home. She submitted claims for reimbursement for meals served to the children during times she was working at RKK.⁹

9. In 2006, Susan Orth's licensing worker became aware that RKK planned to provide some type of award or recognition to Orth for her work at RKK. The licensor became curious to know how Orth could be working at RKK and simultaneously be providing day care in her own home.¹⁰

10. In January 2007, Orth was charged in Washington County District Court with theft by swindle, in violation of Minn. Stat. § 609.52, subds. 2(4) and 3(1) (2006). As originally charged, the complaint alleged a theft of more than \$35,000.¹¹

11. On February 18, 2007, Washington County notified Orth of its determination that there was a preponderance of evidence to show that between 2003 and 2006, Orth committed a felony theft under Minn. Stat. § 609.52. The County also determined that felony theft was a disqualification from licensure under Minn. Stat. § 245C.14. Orth requested reconsideration of the disqualification on the basis that she did not pose a risk of harm to children.¹²

12. On March 24, 2008, the Department issued a notice that the disqualification would not be set aside and an order revoking Orth's license to provide child care.¹³ In declining to set aside the disqualification, DHS found the following factors determinative:

The serious nature of the disqualifying event.

⁸ Test. of S. Orth.

⁹ Ex. E.

¹⁰ Test. of S. Orth.

¹¹ See Minn. Stat. § 609.52, subd. 3(1).

¹² Ex. A.

¹³ An incomplete copy of the March 24, 2008, Order of Revocation is marked as Ex. A; however, a complete copy is attached to the Notice of and Order for Hearing.

The vulnerability of the persons for whom you wish to provide direct contact services. The clients served in the program are children and are vulnerable because of their age.

It has been less than three years since you committed the disqualifying offense. This offense will likely result in your disqualification for 15 years from the date of the discharge of your sentence, including probation, if any. It is therefore too soon to conclude that you have changed your attitude and behavior.

By committing theft of public resources, you violated the trust the public had placed in you. In providing care to a vulnerable population, you would also be in a position of trust.

You have failed to provide any evidence of your rehabilitation or explain why you believe you have been rehabilitated. As a result, there is no evidence that you have undergone changes in your attitude and behavior that will make it unlikely that you will commit a similar act in the future.

It appears that you have not taken responsibility for your actions. As a result, you are less likely to change your behavior in the future.¹⁴

13. On April 14, 2008, Orth pleaded guilty to theft by swindle in violation of Minn. Stat. § 609.52, subd. 2(4) and 3(3)(a) (theft of more than \$1,000 but less than \$5,000).¹⁵ Orth admitted that during certain periods of time, she received more funds from Washington County for child care assistance than she paid to RKK for the children's care and that the difference was at least \$1,000.¹⁶ Pursuant to the agreement, the district court was to determine the amount of restitution to be paid to Washington County. The district court reserved acceptance of the plea until the time of sentencing.¹⁷

14. On July 17, 2008, the district court accepted Orth's guilty plea, stayed imposition of the sentence, and sentenced her to eight days in jail or 80 hours of community service and three years of supervised probation. The court also required Orth to pay restitution in an amount to be determined.¹⁸ At the time of the hearing in this proceeding, a restitution hearing was scheduled to take place on October 1, 2008.

15. Orth timely appealed the revocation of her license.

¹⁴ March 24, 2008, Order of Revocation at 2.

¹⁵ Exs. B and C; Ex. D at 13.

¹⁶ Ex. D at 17-18.

¹⁷ Ex. C at 3; Ex. D at 8, 19.

¹⁸ Ex. B.

16. During the prehearing conference in this matter, held on July 28, 2008, the parties agreed that based on Orth's recent guilty plea to the theft charge, the issue for hearing would be limited to whether the disqualification should be set aside on the basis that Orth does not pose a risk of harm to persons served by the program.

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Notice of Hearing is proper in all respects. The County and the Department have complied with all procedural requirements of law and rule.

3. Conviction of theft in violation of Minn. Stat. § 609.52 is a disqualification from licensure, whether the conviction is considered a misdemeanor, gross misdemeanor, or felony. The length of the disqualification period varies depending on whether the conviction is considered a misdemeanor, gross misdemeanor, or felony.¹⁹

4. A disqualification may be set aside if the Licensee demonstrates that the information relied upon in the disqualification decision was incorrect, or the Licensee demonstrates that she does not pose a risk of harm to children in care.²⁰ In determining whether an individual poses a risk of harm, the Commissioner shall consider (1) the nature, severity, and consequences of the event that led to the disqualification; (2) whether there is more than one disqualifying event; (3) the age and vulnerability of the victim at the time of the event; (4) the harm suffered by the victim; (5) the vulnerability of persons served by the program; (6) the similarity between the victim and persons served by the program; (7) the time elapsed without a repeat of the same or similar event; (8) documentation of successful completion of training or rehabilitation; and (9) any other information relevant to reconsideration.²¹ Any single factor can be dispositive. The commissioner must give preeminent weight to the safety of the persons served by the program over the interests of the disqualified individual.²²

5. The Licensee has failed to make the required showing to set aside the disqualification.

6. The Commissioner may suspend or revoke a license if a license holder has a disqualification that is not set aside.²³

¹⁹ Minn. Stat. § 245C.15, subds. 2-4.

²⁰ Minn. Stat. § 245C.21, subd. 3.

²¹ Minn. Stat. § 245C.22, subd. 4(a).

²² Minn. Stat. § 245C.22, subd. 3.

²³ Minn. Stat. § 245A.07, subd. 3.

7. The license held by Susan Orth should be revoked based on the disqualification that has not been set aside.

8. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based on the above Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of the Department of Human Services AFFIRM the decision not to set aside the disqualification and to revoke the license of Susan Orth.

Dated: October 8, 2008.

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Digitally recorded

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Cal Ludeman, Commissioner, Minnesota Department of Human Services, P.O. Box, 64998, St. Paul MN 55164-0998, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

In determining whether the disqualification should be set aside, the Commissioner is to consider (1) the nature, severity, and consequences of the event that led to the disqualification; (2) whether there is more than one disqualifying event; (3) the age and vulnerability of the victim at the time of the event; (4) the harm suffered by the victim; (5) the vulnerability of persons served by the program; (6) the similarity between the victim and persons served by the program; (7) the time elapsed without a repeat of the same or similar event; (8) documentation of successful completion of training or rehabilitation; and (9) any other information relevant to reconsideration.²⁴

The parties dispute the nature, severity, and consequences of the disqualifying event. The Licensee contends that she did not specifically intend to commit a theft because she believed she was entitled to subcontract the care of her grandchildren to substitute providers, including RKK. She maintains she was unaware that there was anything wrong with the arrangement she and her daughter had set up until she learned, in 2006, that there was a limit of 30 days per year for substitute care.²⁵ Once she learned of this limitation, she halted the practice immediately. She further argues that because of the stay of imposition, the conviction will be considered a misdemeanor offense when she is discharged from her probationary term in three years.

The Department, on the other hand, contends that the disqualifying event should be considered severe because the Licensee misappropriated more than \$50,000 in public funds over a period of four years. The Department argues that the Licensee accomplished the theft by providing misinformation to the County regarding the times when the children were allegedly in her care, and this dishonesty calls into question her ability to care appropriately for children.

The Administrative Law Judge believes the Licensee has minimized the severity of the conduct in question. Even accepting her argument that she was not aware of the rule imposing limits on substitute care, there was much more involved here than violation of the rule. The Licensee systematically and over a period of several years provided false information to the County regarding where the children received care, each time certifying that the information provided was true and each time acknowledging her obligation to report any changes to the County. At the same time, the ALJ believes the Department has overstated the significance of the financial benefit to the Licensee. The prosecution agreed to amend the charge to reflect a theft of between \$1,000 and \$5,000, a significant reduction from the initially alleged theft of more than \$35,000. And although the length of the disqualification period will be at least seven years, it is clear that the

²⁴ Minn. Stat. § 245C.22, subd. 4(a).

²⁵ Minn. R. 9502.0365, subp. 5, provides that a licensed provider must be the primary provider of care in the residence and that the use of a substitute caregiver must be limited to a cumulative total of not more than 30 days in any 12-month period.

period will not begin to run until the time when Orth is discharged from her probationary term, which will be in three years if she is successful in completing probation.²⁶

With regard to the number of disqualifiers and the vulnerability of the victim, the Licensee and the Department agreed that there is one disqualifying event and that the victim (Washington County Department of Human Services) was not very vulnerable. They also agree that there is little similarity between the victim and program clients.²⁷

They disagree as to the harm suffered by the victim. The Licensee contends that the amount of the County's financial loss is yet to be determined, and whatever the amount, it will be fully recovered because the Licensee is obligated to make full restitution. The Department argues that the harm is not just financial. Because the Licensee used her license to accomplish the crime, the public's trust in the County would be harmed if the Licensee were permitted to keep her license and continue to receive the same child care assistance that she was convicted of stealing. The ALJ concludes that the County suffered harm above and beyond the precise amount by which the Licensee financially benefited; substantial county resources have been invested in the prosecution of the crime and the determination of the amount of restitution owed. And the Licensee did use her license as the foundation for this scheme.

They also disagree as to the vulnerability of program clients; the Licensee maintains that the persons served are her three grandsons, who were not aware of or involved in the events leading to disqualification and "are not otherwise vulnerable to the event leading to the Licensee's disqualification." The Department contends the program clients are very vulnerable because they are children, and hence the risk the Licensee poses is higher. The issue is not whether the children were involved in the event leading to the disqualification; the issue is whether the Licensee's dishonest conduct makes her a higher risk in providing licensed care for children. The ALJ concludes that it does. Day care providers are required to comply with detailed rules regarding day care operations, and they are obligated to be honest in all interactions with licensors. To a great extent, the system relies on providers to report all changes in the day care home that may affect compliance with the rules. The Licensee's conduct has diminished the trust the Department can place in her ability to be forthright about the care she provides to vulnerable children.

The Department concluded that two other factors—the time elapsed since a repeat of the same or similar events, and the absence of evidence that the Licensee has engaged in any training, treatment, or rehabilitation—weigh against a set-aside of the disqualification. The Licensee argues that it has been two

²⁶ Minn. Stat. § 245C.15, subs. 2(a), 3(a), and 4(a) (disqualification periods commence with the discharge of the sentence imposed, if any, for the offense).

²⁷ Ex. A (Risk of Harm Assessment).

years since she “ceased the event” and that she has paid her fines, probationary fees, and performed most of her community service. She has barely started her probationary term, however, and she has offered no evidence that she has engaged in any training or other rehabilitation that would increase her knowledge of and familiarity with day care rules. With regard to other relevant factors, the Administrative Law Judge agrees with the Department that the Licensee barely acknowledges that what she did was wrong. It is difficult in this circumstance for her to demonstrate that she has learned enough from her mistakes to avoid them in the future. The Department has properly considered the statutory factors, and its decision should be affirmed.

K. D. S.